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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 47.

SARAH ENELOW, Petitioner, Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY.

PETITIONER'S BRIEF.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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BATAVIA, N. Y.
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PETITIONER'S BRIEF.

This case comes to this Court on a writ of certiorari to review a decree (R. 50) of the United States Circuit Court of Appeals for the Third Circuit entered on April 17, 1934, affirming the decree (R. 44) of the United States District Court for the Western District of Pennsylvania, dated January 2, 1934, and made by Judge McVicar, ordering that the defense of fraud made in the affidavit of defense, in an action at law, be heard by a chancellor according to equity procedure.

Opinions Below.

The opinion of the District Court is not reported but is found at page 39 of the record. The opinion of the Circuit Court of Appeals is reported at 70 F. (2d) 728, and is found at page 49 of the record.

Jurisdiction.

Jurisdiction to review this case is found in the provisions of sec. 240-a of the Judicial Code as amended by the Act of February 13, 1925 c. 229, sec. 1, 43 Stat. 938; (28 USCA sec. 347).

The statute involved is sec. 274 (b) of the Judicial Code (28 USCA Sec. 398, Act of March 3, 1915, c. 90, 38 Stat. 956) which provides as follows:

> "Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

The judgment of the Circuit Court of Appeals was entered on April 17, 1934. The petition for a writ of certiorari was filed on May 17th, 1934 and was granted on October 8th, 1934. The said judgment affirmed the decree (R. 44) of the District Court, ordering that the defense of fraud made in the affidavit of defense in an action at law be heard by a chancellor according to equity procedure.

The Questions Presented.

1. Is section 274(b) of the Judicial Code (28 USCA Sec. 398) to be given effect merely as a procedural statute, or as one extending the jurisdiction of the federal equity court to cases over which it had no jurisdiction prior to said enactment?

2. If a person had no right, prior to the enactment of section 274(b) of the Judicial Code, to apply to a court of equity for relief by bill, has he, because of said enactment, the right to have his case tried, as in equity, before a chancellor by first setting up those facts as a defense in an action at law, and then moving to try that defense, as in equity?

3. If the statute is to be so construed, would it not be in violation of the Seventh Amendment to the Constitution of the United States?

4. Is a party to be denied his right to a trial by jury which he undoubtedly had before the enactment of section 274(b) of the Judicial Code, by reason of said enactment?

Statement.

On July 11th, 1933, petitioner, the widow of Max Enelow, filed a suit at law in the Court of Common Pleas of Allegheny County, Pennsylvania (R. 2), to recover the sum of five thousand ($5,000.00) dollars on a life insurance policy dated December 30th, 1931, issued by respondent on the life of her husband who died on May 27th, 1933. A jury trial was demanded (R. 10).

On August 9th, 1933, respondent caused this suit to be removed to the District Court of the United States for the Western District of Pennsylvania (R. 22).

On October 7th, 1933, respondent filed an affidavit of defense (R. 25) in which it set up the defense that the insured obtained said policy by means of false and fraudulent answers to questions contained in the application. In the affidavit of defense there was included a paragraph in which respondent prayed by way of equitable relief that the policy be surrendered, cancelled and rescinded.

On December 15th, 1933, respondent filed a petition for a hearing in equity (R. 36), claiming that an equitable issue is raised by the pleadings which should be adjudicated by a chancellor according to equitable procedure without a jury, and preferably in advance of a jury trial at law, pursuant to section 274(b) of the Judicial Code (28 USCA Sec. 398).

On December 22nd, 1933, petitioner filed an answer to said petition in which she averred that respondent's defense to said action is one pleadable at law and that can be made fully effective as a defense at law and that respondent has a plain, adequate and complete defense at law; that the prayer for cancellation of said policy is wholly unnecessary, as a judgment at law for respondent will fully end petitioner's case. She therefore prayed that respondent's petition be dismissed.

On January 2nd, 1934, the court made an order (R. 39) granting the prayer of respondent's petition and ordering that the equitable issue referred to in said

petition be heard by a chancellor according to equity procedure in advance of a trial by a jury at law of any legal issue.

On April 17th, 1934, the Circuit Court of Appeals filed an opinion affirming the decree of the District Court.

On October 8th, 1934, this court granted this writ of certiorari.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the order of the District Court dated December 15th, 1933.

2. The Circuit Court of Appeals erred in affirming the decree of the District Court dated December 15th, 1933.

3. The Circuit Court of Appeals erred in not holding that the petition for a hearing in equity should be denied.

Summary of Argument.

Section 274 (a) of the Judicial Code (28 USCA sec. 398) does not authorize the application made by respondent to have its defense of fraud made in its affidavit of defense, in an action at law, heard by a chancellor, according to equity procedure.

Respondent, on the facts presented by the record, has no right to equitable relief.

If section 274 (b) of the Judicial Code is to be construed as to extend the jurisdiction of the federal

equity court to situations over which it had no jurisdiction prior to said enactment, it is in violation of the seventh amendment to the constitution of the United States.

ARGUMENT.

Completeness of respondent's remedy in law suit.

Petitioner is the only person having an interest in the policy sued on. A judgment in favor of respondent on its defense in the law suit will terminate its liability on the policy. Respondent has not, in its affidavit of defense (R. 25), or in its petition for hearing in equity (R. 36), made any claim to the contrary.

In Phoenix Mutual Life Ins. Co. vs. Bailey, 80 U. S. 616, this court has ruled that the defense that a policy was obtained by means of false representations is, if true, a good defense at law and that the defendant has no occasion to resort to a court of equity for relief, there being no special circumstances to show that it may suffer irreparable injury if it is denied a preventative remedy or that the defense, at law, is not as perfect and complete as in equity.

See also Cable vs. United States Life Insurance Co., 191 U. S. 288, Buzzard v. Houston, 119 U. S. 347, and Hipp v. Babin, 19 How. 271. In the last cited case the court said (p. 22):

> "And * * * whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

In the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained: Schoenthal vs. Irving Trust Co., 287 U. S. 92, and section 267 of the Judicial Code (28 USCA Sec. 384).

Respondent has not pleaded that it is without remedy at law, nor has it set up any facts to show that it is in need of equitable relief. Since respondent, under the facts of this case, had no right to file a bill in equity to cancel the policy before the statute was enacted, it cannot now have its defense treated as a controversy in equity triable before a chancellor.

Meaning of "Equitable defense" as used in statute.

Respondent's defense is not an equitable defense within the meaning of the statute. Ballantine's Law Dicitionary, at page 440, defines an "equitable defense" as follows:

> "Any matter which would authorize an application to a court of chancery for relief against a legal liability, *but which at law could not be pleaded in bar*. That is, a defense which is recognized by courts of equity, acting *solely* upon the inherent rules and principles of equity, altogether outside and independent of those rules and defenses which obtain in a court of law. The defense of laches is such an equitable defense." (Italics ours.)

Mr. Justice Cardozo defined "equitable defenses" in Petrogradsky Mejdunarodry Kom. Bank v. National City Bank, 253 N. Y. 23, and in Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co. Inc., 239 N. Y. 285, similarly. In the latter case he said: "With us, the rule is that—

> "Under the head of equitable defenses are included all matters which would have before authorized an application to a Court of Chancery for relief against a legal liability *but which at law could not have been pleaded in bar.*' " (Italics ours.)

The term "equitable defenses", within the meaning of section 274(b) of the Judicial Code, has been similarly defined in Ford v. Huff, 296 Fed. 652 (C. C. A. 5th Cir. Cert. refused 266 U. S. 602).

Only formal distinction abolished.

In considering this statute, the court, in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, at p. 242, made clear that in statutes of this character only the *formal* distinction between proceedings in law and equity is abolished. "Neither legal nor equitable remedies are abolished under such codes. 'What was an action at law before the code is still an action founded on legal principles; and what was a bill in equity before the code is still a civil action founded on principles of equity.' Sutherland, Code Pl., Pr. & Forms, Sec. 87." The court then adverted to the "most important limitation upon a Federal union of the two kinds of remedies in one form of action", namely, the Seventh Amendment to the Constitution of the United States preserving the "right of trial by jury."

In Smith v. American Nat. Bank, 89 Fed. 832 (C. C. A. 8th Cir.) the court, at page 838, after quoting the seventh amendment of the constitution,* said:

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* "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment VII to the Constitution of the United States.

> "The effect of this provision is to declare that the right of trial by jury shall depend neither on legislative nor judicial discretion. In the absence of this provision, this right might be impaired (1) by the organization of courts in such manner as not to secure it to suitors; (2) by authorizing courts to exercise, or by their assumption of, equity or admiralty jurisdiction over cases at law."

In Union Pacific Railroad Company vs. Syas, 246 Fed. 561, 565, (C. C. A., 8th Cir.), the court said:

> "This statute (sec. 274b of the Judicial Code) brings into the federal courts the procedure that has long prevailed in many of the states where Codes of Civil Procedure have been adopted. The statute is intended to prevent a circuity of action by allowing the rights of either party to an action at law, whether legal or equitable, in respect to one subject-matter, to be determined in one action; but, while the statute permits the granting of equitable relief in an action at law, Congress did not intend, in our opinion, to change in any way, except as to procedure, the essential distinction between law and equity. Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452, and Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800."

Conflicting constructions of statute by C. C. A. of 5th Cir.

The Circuit Court of Appeals for the Fifth Circuit had before it the question here involved in the cases of American Cyanamid Company v. Wilson & Toomer Fertilizer Company, 62 F. (2d) 1018 (certiorari denied 289 U. S. 735), and Phillips-Morefield *et al.* v. Southern States Life Insurance Company, 66 F. (2d) 29, and reached diametrically opposite conclusions in the two cases.

In the American Cyanamid case the defendant, after filing an answer to a law action, filed a so-called equitable plea which alleged fraud and prayed the court, sitting as chancellor, to take jurisdiction, require a reply as provided by statute, and, on final trial, annul and cancel the plaintiff's claim, and that, pending such determination as the chancellor will make, proceedings on the law side of the court be suspended as though enjoined by bill in equity. In refusing the prayers, the court, at page 1020, said:

> "Equity is not over objection to assume jurisdiction because of either (equitable estoppels and questions of fraud) if the remedy at law is plain, adequate and complete; *nor will a prayer for an unnecessary cancellation serve as an excuse* (citing cases). The prayer for a cancellation of Wilson & Toomer Company's claim against Cyanamid Company may be put aside. A judgment at law for the defendant will effectually end it. One for the plaintiff will merge it. There is no written instrument capable of future harm to be cancelled." (Italics ours.)

In the Phillips-Morefield case, the court said:

> "The principal contention of appellant is that the equitable plea was improperly allowed, on the ground that the defenses set up therein could have been urged at law. Therefore the insurance company had an adequate remedy at law, and, by maintaining the plea, she was deprived of a trial by jury. In support of this appellant relies upon the cases of N. Y. Life Ins. Co. v. Marshall, 23 F. (2d) 225, decided by this court, and Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501. Those cases may be easily distinguished. In each case it appeared that a separate bill in equity had been filed for the cancellation of a life insurance policy, and there was an action at law pending on the policy. It was held that the grounds for cancellation of the policies alleged

> in the bills could be urged in defense in the pending suits at law. The bills were dismissed on the ground that the insurance companies had an adequate remedy at law. The situation is different when an equitable defense is interposed in an action at law, under the provisions of the Act of March 3, 1915, adding section 274b to the Judicial Code (28 USCA Sec. 398)."

The opinion in the American Cyanamid case, we submit, is well reasoned. The opinion in the Phillips-Morefield case gives no reason for its conclusion. It merely says the situation is now different from what it was when the cases of N. Y. Life Insurance Co. v. Marshall, 23 F. (2d) 225 and Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616 were decided because of the passage of the Act of March 3, 1915, section 274(b) of the Judicial Code. It does not explain in what respect the situation is now different. Its strange conclusion is at variance with what this court said in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235.

New York Life Insurance Company vs. Marotta, 57 F. (2d) 1038, (C. C. A. 3rd Cir.), cited by Judge McVicar of the District Court, did not have our side of the case presented to the Circuit Court of Appeals. We have examined the appellees' brief in that case and find that the appellees entirely ignored the question whether, under a situation such as presented here, the court could under sec. 274(b) of the Judicial Code dispose of the defense as a case in equity.

The editor of the United States Code Annotated, in a note to Title 28, sec. 398, in the 1933 Cumulative Annual Pocket Part makes a conjecture that the word "of" was inadvertently used in sec. 274(b) of the Judicial Code for the word "or". That statement is due

to a superficial reading. It is plain that the draftsman of the Act was referring to a defense which embodied a prayer for equitable relief, that is, affirmative relief. The sentence would be crude if it read as suggested, namely, "The defendant shall have the rights in such case as if he filed a bill embodying the defense *or* seeking the relief prayed for in such answer or plea." The draftsman did not mean a defense which consisted of nothing more than an assertion that a money judgment should not be entered against the defendant because the instrument sued on was obtained from him by fraud. That he used the right word cannot be open to doubt when the purpose sought to be accomplished by the statute is perceived. The editor says that the word "of" appears in the original statute.

Respondent, while saying it did not oppose the granting of a writ of certiorari, gave two reasons why the decree of the court below should not be disturbed. The first reason was:

Fraud—unsound claim of different tests

> "There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief." (Mem. for Resp. 4.)

There are two answers to this contention. In the first place, the policy provides (R. 13):

> "The policy and the application therefor, copy of which is attached hereto, constitute the entire

> contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is endorsed upon or attached to this Policy when issued."

Recognizing the effect of the above provision and that because thereof respondent has to prove "knowledge of the falsity" of the answers, respondent pleads such knowledge as follows (R. 31):

> "15. Said answers were made by Max Enelow with knowledge of their falsity and fraudulently for the purpose of procuring said insurance."

It is not necessary to cite cases to establish the proposition that a party must prove his case, as pleaded. In view, therefore, of the contract and the charge in the affidavit of defense, it is difficult to understand how respondent can seriously advance the proposition that it has no adequate remedy at law in pleading as a defense, in the lawsuit, the alleged answers claimed to have been *knowingly and fraudulently* made and that only a court of equity can give it adequate relief because in equity it can win its case by merely showing that the answers were material and untrue and without proof that they were made knowingly and with fraudulent intent. Surely they cannot mean that because they were able to get the order of court that this case be tried by a chancellor according to equitable procedure, they have gotten the issues made up by the pleadings changed in some manner, so that they do not have to prove *all* of the facts which they set out as their defense in the affidavit of defense.

In the next place, it is difficult to conceive of such a strange animal as an innocent fraud,—a fraud perpetrated without knowledge of the falsity of the fraudulent representation. If a man makes false statements, recklessly, and without any reasonable basis, he can be held to the same consequences as a man who makes false statements knowingly. He *is* a fraud for he is impliedly representing that he *knows* the facts with reference to certain matters when he does not. It is true that in the case of Smith vs. Richards, 38 U. S. 26, which was a bill to rescind a contract for the purchase of a gold mine because of fraudulent representations, the court said that even though the appellant made the representations under the influence of delusion, it is sufficient for the decision of *that* case if it be established that the representation was untrue in material parts of it. But the court, in Southern Development Company vs. Silva, 125 U. S. 247, where it dismissed a similar bill, stated that one of the elements necessary to be established was that the alleged false representation was not actually believed by the defendant, on reasonable grounds, to be true.

"Innocent" fraud

What this court said in the Smith-Richards case, *supra,* on the subject of fraud applies as well in a case at law:

> "Whether the party thus misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one does not know, or believe to be true, is equally, in morals and *law,* as unjustifiable as the affirmation of what is known to be positively false." (Italics ours.)

Can it be doubted that if a jeweler innocently misrepresents a watch-case to be solid gold, 18 karat fine, when as a matter of fact it is only gold-filled, or 14 karat fine, the purchaser may, on discovery of the fact, recover the money paid for the watch in an action at law?

Unfortunately, ill considered expressions are to be found in some cases to the effect that in law the complaining party must prove not only the falsity of the statements but that the party making them had knowledge of their falsity and that in equity the last element is immaterial. The answer to the apparent conflict in the cases is this: If a man makes representations of fact as regards a matter about which he has knowledge, or about which he is *presumed* to have knowledge, as when a man is "talking up" a piece of property of his, and describes its qualities and characteristics, and it appears that these representations were untrue, the contract will be rescinded in a court of equity, or the maker of the representations will be compelled, in a court of law, to refund the consideration that he received as a result of the misrepresentations, regardless of whether he knew them to be false or not. But, on the other hand, when the misrepresentation consists of *an answer given in response to a question* and it is plain that the question is intended to elicit *the information that the party has* upon the subject, or an opinion, and nothing else, if the answer is given honestly and in good faith, he cannot be held for the incorrectness of the answer unless he makes his answer a warranty. When an insurance company, in its printed inquiries contained in the application, asks the applicant, for instance, whether he has can-

cer, the question can't be understood in any other way than to mean: "Have you cancer, to your knowledge, or in your opinion?" We all know that the disease is an insidious one and that a person having it may not suspect it until it is in an advanced stage. The insurance company certainly cannot be heard to say that it meant and expected to get an answer "Yes" from a man who did not suspect that he had cancer. It was in recognition of this principle that there was inserted in the policy the provision cited above: "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

While the exact question that was put to the defendant in the case of Southern Development vs. Silva, *supra,* was in dispute, yet the essence of it related to the extent of the work that had been done in the mine (p. 257), and when the intending purchaser asked the seller as to that, he must also be understood to have been inquiring as to the extent of the work done in the mine *according to the seller's knowledge.* He would have been foolish to expect the seller to tell him of any work done in the mine of which the seller was ignorant. If the matter was sufficiently material to the purchaser, he could by agreement have made the answer a warranty. And as this was not done, the court held in that case that even though the representation was untrue, since it was not shown that the seller knew it was untrue, the contract would not be rescinded on that ground. The fine illuminating opinion of Judge Hook in Kimber vs. Young, 137 Fed. 744 (C. C. A. 8th Cir.) will help to clear away the confusion. The cases merely hold that the *action for deceit at common law*

is founded upon fraud and that the scienter must be proved. And it is equally necessary to prove deceit, —fraud— of which the scienter is an indispensable element, in a bill in equity, if deceit or fraud is therein charged. The Kimber case shows many instances of *charges* of fraud and deceit where the representation, upon a careful examination, proved to be only the expression of an opinion and not a representation of an alleged fact.

The second reason given by respondent for sustaining the decree of the court below was as follows (Mem. for Resp. 5):

> "The petitioner is not the only person having an interest in the policy sued on, as stated in her brief. If the policy of insurance, which is the subject of the litigation, was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate, and not to the beneficiary, the petitioner. The executors of Max Enelow's estate are Anna Katz and Myer Enelow. These persons are not parties to the present suit. That the petitioner is not the only person with an interest in the subject matter of this litigation follows as a matter of law and therefore that legal conclusion need not be pleaded."

Unsound contention of other interest,—Only petitioner can sue on policy

Respondent then cites a case to establish the proposition that the remedy at law "must be in all respects equal to that in equity in order to oust the latter of jurisdiction." In other words, the respondent hints that equity, or what amounts to the same thing, the trial of this issue before a chancellor according to equitable principles, can give respondent more complete relief than a court of law can give it. The above seems to be predicated upon the hope that this court will overlook the fact that the executors, if they

No additional parties in equity hearing

have any interest,—and they have not,—*are not parties to the controversy that would be heard by the chancellor* any more than they are to the law suit? A decree of a chancellor in this case would be no more binding upon the executors than a judgment in the action at law.

There is nothing in this contention from any aspect. Hundreds of cases have been defended by insurance companies on the ground of fraud. They asserted their defense and the courts sustained them, or did not sustain them. In those cases where they were sustained and where it was held that the policies were procured by fraudulent misrepresentations, no one, we believe, raised the point that the executors or administrators of the assured could then bring a suit. For what? For the amount of the policy? The personal representatives were not the beneficiaries. And if there is a question as to who is entitled to the few dollars of premiums which they tendered, why did the respondent in this case tender them to the petitioner, the beneficiary? (Aff. Def. Par. 16, R. 31.) If this point is a good one, it should have been raised in the case of Phoenix Mutual Life Insurance Co. v. Bailey, 80 U. S. 616, as a separate ground for equitable jurisdiction over the bill to cancel.

Exceptions to rule against bills to cancel

We do not contend that insurance companies can under no circumstances file bills to cancel policies on the ground of fraud. Insurance companies have in modern times been tempting people to buy insurance by incorporating in the policies a provision that the policy shall be incontestable except for non-payment of premiums after a certain period. This provision, at first purely voluntary, later became compulsory

when legislatures, finding it necessary to regulate the business, took a leaf out of the insurance companies' books and made it compulsory. But a policy containing such a provision presented an anomalous situation. The alleged fraud of the insured in procuring the policy is a defense to an action on it, but only for a certain period after its issuance. When that period has passed the alleged fraud is forgiven. Public interest in protecting and preserving the rights of beneficiaries of life insurance against claims of insurance companies that they were misled into issuing the insurance by the answers to the many involved questions supposed to have been put to the applicant by their agents, enforced these provisions in spite of the well-known principe that "fraud vitiates all contracts."*

As it was possible that a suit might not be brought on a policy within the contestable period, courts have allowed them to make a contest within the contestable period by filing a bill to cancel. The ground for jurisdiction over such bills, however, is not as counsel for defendant claims "because the defense is clearly an equitable one", for, as we have shown, this court in the case of Phoenix Mutual Life Insurance Company vs. Bailey, *supra,* said that federal courts of equity do *not* have jurisdiction of bills to cancel policies for fraud where that charge can be made fully effective as a defense to a suit at law. In other words, it was because of an entirely different principle of equity jurisprudence that the bills were entertained, viz.: that

* To circumvent the requirements of the statutes (R. pp. 7-8) that a copy of the application must be attached to the policy so that the applicant might know what answers the agents wrote into the application, the companies attach such microscopic photostats of the application that they either cannot be read at all or cannot be read except with considerable difficulty and eye-strain. The purpose is to discourage the reader. No legitimate reason can be given for these miniature copies. An interesting case on the subject is New York Life Insurance Company vs. Halpern, 57 F. (2d) 200, affirmed 61 F. (2d) 1037.

the plaintiff *had no adequate remedy at law* for it was within the power of the holder of the policy to postpone the bringing of the suit until after the contestable period had expired. And even if a suit to recover on a policy was brought within the contestable period, *if all of the parties having an interest in the policy were not included as plaintiffs,* a judgment that the policy was obtained by fraud would not be binding against the absent parties. Insurance companies were, therefore, permitted in such exceptional cases to maintain bills to cancel policies, notwithstanding the institution of the prior action at law against them.

In all of the *reported* cases, except one, that we have come across where a bill to cancel a policy was sustained, the bill was either filed *before* the lawsuit was brought on the policy, or if it was filed after the suit the lawsuit *did not have in it as plaintiffs* all of the persons having an interest in the policy. The overwhelming number of cases where federal courts have held that bills to cancel policies were maintainable were those of the first class above referred to, namely, those in which the bill was filed *before* any action at law was instituted.

In New York Life Ins. Co. v. Hurt, 35 F. (2d) 92, the court held that the "contest" contemplated in incontestable clauses of life insurance policies may be made either by equitable action to cancel policy or by answer in the suit at law brought to recover under the policy, citing a number of cases which it termed "the great number and weight of authority" on the point.

The point of that decision is that what the respondent in this case has done, namely, to file a defense setting up the alleged fraud, *is* the initiation of a contest;

that it *had* put itself within the protection afforded it by the policy, and that regardless of whatever becomes of that lawsuit, respondent has made a contest within the contestable period upon the grounds set forth in the affidavit of defense. There is therefore gone, so far as this case is concerned, *the entire basis* upon which courts of equity have been entertaining bills to cancel insurance policies.

As stated, the Hurt case also belongs to the second class of cases referred to by us above, cases where the insurance company pleads that it ought to be allowed to maintain a bill, notwithstanding the institution of the prior lawsuit, because it is seeking relief *against someone else besides the plaintiff in the lawsuit.* That cannot be here. If the policy in the case at bar be cancelled by a chancellor, the decree runs against the plaintiff in the lawsuit,—no one else.

In the Hurt case the *assignees* of an insurance policy first brought an action at law. The company then *filed a bill* praying cancellation for fraud not only against the assignee, but also against the widow as "the first person to be entitled to be named as administrator of the estate of" the assured. The court said on this point (p. 95):

> "Does the fact that the defense might have been made by answer, within the period, nullify the effect of filing the equitable action and thus deprive the company of the defenses set up in such action? We think not under the circumstances of this case. Here the law action on the policy was brought by the assignees thereof alone. The policy was assignable, but was issued in favor of 'The Executors, Administrators or Assigns of the Insured, or to the duly Designated Beneficiary.' The company had the right to protect itself against all claims from any one upon the policy.

> In the law action, such protection was only against the assignees who were the only plaintiffs therein at the time. The only way in which it could be sure of complete protection was by bringing its equitable action and making the administratrix a party thereto."

There was considerable of a complication in that case. The assignees of the policy brought the law action first. The company then filed a bill to cancel, but within the contestable period. It also filed an answer to the law suit, but this answer was filed *after* the expiration of the contestable period. The answer included the matters averred in the bill. Thereafter the two cases were consolidated. The lower court *denied* a motion of the company to proceed to a hearing in the equity suit and *sustained* a motion for judgment for the plaintiffs in the law action *because the answer to the law action was filed after the contestable period had expired.* In other words, the lower court held at one and the same time that the bill should be dismissed because the complainant had at the time it was filed an adequate remedy at law, to wit, a right to attack the policy in the law suit, and deprived the company of the defense of fraud in the law action because the answer to the law action was filed too late. The Circuit Court of Appeals reversed and said the proper procedure under the circumstances here was to try the law case before acting upon the equitable action but in a trial of the law case the equitable defense should have been first disposed of. Under the special and extraordinary circumstances of that case we do not question the correctness of the action of the Circuit Court of Appeals in not following the lower court, *which denied the insured a chance to present its defense of fraud in either action.*

In Peake vs. National Life Insurance Co., 15 F. (2d) 303 (C. C. A. 8th Cir.), the court sustained a bill to cancel which was filed *before* a law suit, but made it clear that it would have dismissed the bill, if *the law suit* had been, as in the case at bar, filed first. The court said:

> "Appellants contend that (1) Mrs. Peake's claim is a legal demand and appellee could make its defense of fraud and deceit to that action as a legal defense, and thus had a remedy at law, Insurance Co. v. Bailey, 13 Wall, 616, 20 L. Ed. 501; (2) the insurer's claimed equitable right and remedy are fully set up in an answer to Mrs. Peake's action, filed within the two years' time named in the incontestable clause of the policy, and those rights can be adjudicated in that action, hence there was no occasion to enjoin the prosecution of that action, U. P. Ry. Co. v. Syas, 246 F. 561, C. C. A. 531; and (3) * * *
>
> *"If Mrs. Peake had brought her action before the equity suit had been instituted, and if it were established that she and the insurer were the only parties interested in the subject, the first two propositions contended for might be conceded as sound."* (Italics ours.) Opinion, pp. 304, 305.

Respondent says in its memorandum (p. 3): "There was no provision in the law when those cases (Phoenix Mutual, *Supra,* Cable, *supra,* Buzzard vs. Houston, 119 U. S. 347, and Hipp vs. Baben, 19 How. 271) were decided for the introduction of equitable defenses in actions at law". Does respondent mean to contend by this that if A brought a suit at law against B to recover the price of a mine which he sold to B, and the latter defended on the ground that he was induced to buy it by false and fraudulent representations made by A, that such defense could not be heard, and that judgment must go for the plaintiff regardless of the

defense? Or does it mean that such an extraordinary situation would have resulted if the suit were brought in a Federal Court prior to the enactment of Section 274(b) of the Judicial Code?

Respondent realized that the burden was upon it to show that it was without adequate remedy at law. The only things it could offer were the alleged difference in the degree of proof required to establish fraud in a court of equity and the statement that the executors of the assured were not parties to the suit, apparently being willing to overlook the facts that by its policy and affidavit of defense it was required to prove *knowledge* of falsity, that the executors were not parties to the controversy to be heard by the chancellor, either, and that respondent had tendered a refund of the premium to *petitioner*.

Respondent's inability to offer any better reasons demonstrates the impropriety of making use of Sec. 274(b) of the Judicial Code to deny to petitioner the constitutional right of trial by jury.

Conclusion.

The use which has been made of Section 274 (b) of the judicial code to deny the right of trial by jury is a perversion of its purpose and it is extremely important that this court shall so declare.

Respectfully submitted,

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